

# State of California

## Office of Administrative Law

**In re:**  
**Professional Fiduciaries Bureau**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Regulatory Action: Title 16  
California Code of Regulations**

**Government Code Section 11349.3**

**Adopt sections: 4544, 4600, 4602, 4604,  
4606, 4608, 4610, 4620,  
4622, 4624**

**OAL File No. 2009-0928-02 SR**

**Amend sections: 4422, 4440, 4446, 4470,  
4482**

**Repeal sections:**

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### **SUMMARY OF REGULATORY ACTION**

The Professional Fiduciaries Bureau (Bureau), an agency under the Department of Consumer Affairs (Department), proposed this regulatory action to amend five sections and adopt ten sections in the Bureau's licensing program in Title 16 of the California Code of Regulations. The regulatory action primarily implemented the Bureau's disciplinary and enforcement authority, including citations, fines, probation and rehabilitation, and procedures for licensees to appeal Bureau disciplinary actions. The proposed regulatory action also amended regulations pertaining to applicant education requirements, continuing education, annual licensee reporting, licensee code of ethics, and miscellaneous cleanup amendments.

### **DECISION**

On November 9, 2009, the Office of Administrative Law (OAL) notified the Bureau that the proposed regulatory action failed to comply with the California Administrative Procedure Act (APA) and was disapproved. The reasons for OAL's disapproval are based on the following:

1. The proposed regulations failed to meet the APA "necessity" standard, pursuant to Government Code sections 11349(a) and 11349.1(a)(1) and title 1, California Code of Regulations, section 10(b).
2. The proposed regulations failed to meet the APA "clarity" standard, pursuant to Government Code sections 11349(c) and 11349.1(a)(3) and title 1, California Code of Regulations, section 16.
3. The Bureau failed to satisfy the APA procedural requirement to adequately summarize and respond to some of the public comments in the Final Statement of Reasons, pursuant to Government Code section 11346.9(a)(3).

This decision discusses many of the APA issues resulting in OAL's disapproval of the proposed action, but is not exhaustive of all APA issues that need to be resolved. OAL identified and discussed all the APA issues with the Bureau staff. Because the regulation text and rulemaking documents will require substantial revision or supplementation, OAL reserves the right to conduct a complete APA review when the regulatory action is resubmitted.

## **DISCUSSION**

The adoption of regulations by the Bureau must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Government Code section 11346.) No exemption or exclusion applies to the Bureau's proposed regulatory action.

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code sections 11349 and 11349.1. Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In this review, OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of rules and regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided a meaningful opportunity to comment on rules and regulations before they become effective. (Government Code sections 11340.1 and 11349.1.)

### **A. Necessity**

Government Code section 11349.1(a)(1) requires OAL to review all regulations for compliance with the "necessity" standard. Government Code section 11349(a) provides the following definition of the necessity standard:

(a) Necessity means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purpose of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

Title 1, California Code of Regulations, section 10(b) elaborates on the Government Code section 11349(a) "substantial evidence" requirement for satisfying the necessity standard:

(b) In order to meet the “necessity” standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

(1) A statement of the specific purpose of each adoption, amendment, or repeal; and

(2) information explaining why each provision of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An “expert” within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

In order to provide the public with an opportunity to review and comment upon an agency’s perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the Initial Statement of Reasons. (Government Code section 11346.2(b).) The Initial Statement of Reasons is the primary document in the rulemaking record that demonstrates that the adoption, amendment, or repeal satisfies the “necessity” standard. The Initial Statement of Reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, “why” a regulation is needed and “why” the particular provisions contained in this regulation were chosen to fill that need. (Government Code section 11346.2(b)(1).) The Initial Statement of Reasons must also identify any technical, theoretical, or empirical study, report, or similar document upon which the agency relies. (Government Code section 11346.2(b)(2).)

The Initial Statement of Reasons must be submitted to OAL with the Notice of the Proposed Action and be made available to the public during the public comment period, along with all the information upon which the proposal is based. (Government Code sections 11346.2(b) and 11346.5(a)(16) and (b).) In this way the public is informed of why the regulation is needed and why the particular provisions contained in the regulation were chosen to fill that need. This information is essential in order for the public to comment knowledgeably. The Initial Statement of Reasons and all data and other factual information, studies or reports upon which the agency relies in the regulatory action must also be included in the rulemaking file. (Government Code sections 11347.3(b)(2) and (7).)

The Initial Statement of Reasons provided with this proposed regulatory action was inadequate to demonstrate the need for many regulatory provisions and for at least two of the new sections proposed for adoption in the October 2008 45-day regulation text. The general purpose for amending or adopting each section is summarized briefly in the first two pages of the Initial Statement of Reasons. With few exceptions, however, the five-page discussion under the “Factual Basis/Rationale” heading only summarizes the Bureau’s general statutory authority over the fiduciary licensing program, the Bureau’s policy objectives for the proposed regulations, and the need to protect consumers from historical abuses by persons acting as fiduciaries. There are only a few instances where the factual rationale discusses anything specific regarding the specific proposed regulatory provisions or sections proposed for adoption.

Specifically, the 45-day proposal included amending title 16, sections 4422, 4440, 4470, and 4482 (amended section 4446 was added as part of the June 2009 15-day modified text) and the adoption of ten new title 16 sections: sections 4544, 4600, 4602, 4604, 4606, 4608, 4610, 4620, 4622, and 4624. Of these proposed sections to be adopted, only sections 4604, 4620, and 4622 are specifically discussed by name in the Initial Statement of Reasons. While the need for amending or adopting some of the unnamed sections are either self-evident or non-substantive and ostensibly might not require an extensive demonstration of facts or information, of particular concern is the lack of sufficient facts or information to demonstrate the need for amending title 16, section 4440 (Prelicensing Education Requirements), or for adopting title 16, sections 4544 (Ongoing Reporting Duties) and 4624 (Disciplinary Order).

1. Section 4440. The only statement pertaining to the amendments to section 4440 is in the brief summary on page one of the Initial Statement of Reasons:

Amends Section 4440.

This amendment changes the date for qualifying prelicensing education credit for licensure as cleanup.

The amendments to section 4440 proposed in the October 2008 45-day text encompass substantially more than a date change. The amendments to this section are not explained in the Initial Statement of Reasons. Additionally, section 4440 underwent substantial modification in the June 2009 15-day modified text, which deleted most of the proposed amendments and reinstated most of the original section text. The demonstration of need for the reinstated and other modified text from June 2009 is provided in the Final Statement of Reasons and is generally adequate. However, the need for the addition of the new subdivision (c) to section 4440 is not sufficiently addressed in the rulemaking file. Additionally, the need for the original 45-day amendments that were removed in the June 2009 15-day modified text was never explained. In the supplemental statement of reasons, the Bureau will need to explain the need for the original amendments in the 45-day text and why those amendments were no longer needed in the 15-day text for section 4440.

2. Section 4544. The brief summary of section 4544 on page two of the Initial Statement of Reasons states,

Adopts Section 4544.

This section specifies the ongoing reporting duties for licensure

This statement scarcely describes what is contemplated in the adoption of the section 4544 reporting requirements in the proposed October 2008 45-day text, and the section is not mentioned by name in the “Factual Basis/Rationale” discussion of the Initial Statement of Reasons. While the factual rationale on page three of the Initial Statement of Reasons refers generally to statutorily mandated reporting required of fiduciary licensees under the Business and Professions Code, it does not specify any specific statutory reporting requirements. Additionally, the same discussion refers generally to reporting requirements of fiduciaries under Probate Code section 2342 (repealed, January 1, 2009) and reporting requirements pertaining to private fiduciaries registered with the California Department of Justice. However, nothing in the

discussion specifies what these requirements provide or how they demonstrate any statutory mandate or factual need for the specific reporting provisions proposed for adoption of section 4544. There are substantial differences in the regulatory provisions in section 4544 in comparison to former Probate Code section 2342, making it unclear why the Probate Code or any California Department of Justice reporting requirements are relevant to the proposed action. In the supplemental statement of reasons, the Bureau will need to clarify and elaborate upon the factual rationale discussion to identify which of the section 4544 reporting provisions are required by statute or to otherwise demonstrate the factual need and rationale for adopting the specific, reporting requirements in section 4544 in the 45-day text.

3. Section 4624. The brief summary of section 4624 on page two of the Initial Statement of Reasons states:

Adopts Section 4624.

This section specifies disciplinary guidelines for enforcement actions.

Aside from this statement, section 4624 is not named nor is its regulatory provisions discussed in the “Factual Basis/Rationale” discussion of the Initial Statement of Reasons. Section 4624 is the longest of the ten sections proposed for adoption in the October 2008 45-day text and provides for the types of disciplinary orders that may be imposed on fiduciary licensees by administrative law judges in Bureau administrative disciplinary proceedings pursuant to Business and Professions Code section 125.3 and Government Code sections 11425 and 11519. The types of disciplinary orders provided by section 4624 include reproof, license revocation or suspension, or probation. The provisions in section 4624 apply almost exclusively to probationary orders. Aside from mandatory probationary terms and conditions in section 4624 that administrative law judges would be required to include in probationary orders, the regulation text provides little in the way of “disciplinary guidelines for enforcement actions” for probationary terms and conditions that are discretionary to administrative law judges or for determining the other types of disciplinary orders.

Arguably, guidelines are provided to some extent by other title 16 regulations, including existing sections and sections in the proposed action, that provide factors that the Bureau must consider when determining whether to impose fines, citations, or enforcement actions against licensees, but there is nothing provided in the Initial Statement of Reasons that suggests that section 4624, which applies to administrative law judges, should be read in context of these other regulations or any other law. Additionally, section 4624 as proposed in the 45-day text has issues in meeting the APA clarity standard, some of which cannot be fully ascertained due to the lack of facts or information to explain either the need for section 4624 or how to gauge whether section 4624 is consistent with the stated purpose of the proposed section. Issues regarding the APA clarity standard are discussed below.

In the supplemental statement of reasons, the Bureau will need to provide a complete statement to demonstrate the factual need and rationale for adopting the regulatory provisions in section 4624 as proposed in the 45-day text. The Initial Statement of Reasons statement, “This section specifies disciplinary guidelines for enforcement actions,” should be revised so that it is explained how proposed section 4624 effectuates the purpose of the statute.

4. Other Regulatory Provisions. In addition to the sections discussed above, several specific regulatory provisions were identified and discussed with the Bureau staff that will require supplemental statements pertaining to either the October 2008 45-day text or the June 2009 15-day modified text. The following are examples of those provisions: section 4470(g) (services approved by court), section 4604(b) (rationale for \$2,500 as threshold for enhanced fines), and section 4606(a) (commencement of ten-day period based on personal service versus certified mail).

For the reasons discussed above, the Initial Statement of Reasons failed to provide sufficient facts and information for explaining the need for many of the regulatory provisions in the proposed regulatory action and, therefore, failed to meet the necessity standard pursuant to Government Code sections 11349(a) and 11349.1(a)(1) and title 1, California Code of Regulations, section 10(b). Additionally, the Final Statement of Reasons failed in several instances to explain the reasoning or demonstrate the factual basis for some of the regulatory provisions that led to the substantial revision of the proposed regulations in the June 2009 15-day modified text. It is vital that this information be made available to the public during the rulemaking process so that the public is informed of the basis of the proposed action and can comment knowledgeably during the public comment period.

## **B. Clarity**

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. (Government Code section 11340(b).) Government Code section 11349.1(a)(3) requires OAL to review all regulations for compliance with the “clarity” standard. Government Code section 11349(c) defines the clarity standard to mean “. . . written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them.”

The clarity standard is defined further in title 1, California Code of Regulations, section 16, which provides:

In examining a regulation for compliance with the “clarity” requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

- (a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exists:
  - (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
  - (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or
  - (3) the regulation uses terms which do not have meanings generally familiar to those “directly affected” by the regulation, and those terms are defined neither in the regulation nor in the governing statute;
  - (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or

(5) the regulation presents information in a format that is not readily understandable by persons “directly affected;” or

...

(b) Persons shall be presumed to be “directly affected” if they:

- (1) are legally required to comply with the regulation;
- (2) are legally required to enforce the regulation; or
- (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
- (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

The following examples illustrate some of the clarity issues contained in the final regulation text.

1. Section 4440(c). Subdivision (c) of section 4440, which is new text that was added in the substantial revision to this section in the June 2009 15-day modified text, provides:

(c) The information provided to the applicant in an education course that qualifies pursuant to subdivisions (a) and (b) must be substantially related to existing law at the time of application. [Emphasis added.]

As modified, paragraph one of section 4440 deems the courses provided in subdivisions (a) and (b) as qualified prelicensing education credits toward the fiduciary license. Subdivision (c) conflicts with this, since applicants who have taken the coursework deemed qualified in (a) and (b) could have the credits disqualified by subdivision (c) if the courses are not “substantially related to existing law at the time of application.” Because of this inherent conflict, section 4440 is unclear.

Additionally, it is unclear who is responsible for determining if prelicensing coursework is substantially related to existing law at the time of application. If the Bureau intended the responsibility as the applicant’s, which would be consistent with section 4440, it is unclear how an applicant would know whether coursework taken or planned is substantially related to existing law. If the Bureau intended the responsibility as a directive to course providers, then subdivision (c) appears to have been misplaced and should perhaps have been added to title 16, section 4448, Requirements for Education Providers.

Finally, the term “substantially related to existing law” is not defined. Left this way, subdivision (c) is unclear to applicants or course providers as “persons directly affected.” Nothing in the Final Statement of Reasons clarifies any of these issues.

2. Section 4606(a). Section 4606(a) is all new text and provides:

(a) In addition to requesting an administrative hearing as provided for in subdivision (b)(4) of Section 125.9 of the Business and Professions Code, the cited person may request an informal conference to review the acts charged in the citation. A request for an informal conference shall be made in writing, within ten

(10) days after the citation has been served upon the individual personally or by certified mail.  
[Emphasis added.]

Section 4606(a) is unclear with respect to when the ten day period commences for requesting an informal conference to contest a citation if a citation is “served ... by certified mail,” since it is unclear whether the time starts when citation is mailed, when the licensee receives the citation by certified mail, or if some other standard applies.

3. Section 4624. Section 4624 proposes all new text and applies to administrative law judges, not to the Bureau, in hearing disciplinary proceedings and issuing disciplinary orders against fiduciary licensees pursuant to Business and Professions Code section 125.3 and Government Code sections 11425 and 11519. Accordingly, both administrative law judges and fiduciary licensees are “persons directly affected” by section 4624. (Title 1, California Code of Regulations, section 16(b).)

The text proposed in section 4624 text contains several clarity issues. Additionally, as discussed above, section 4624 fails to meet the necessity standard.

a. Subdivision (c). Section 4624(c) provides the basis for an administrative law judge for determining whether to impose a probationary order on a licensee. Subdivision (c) provides,

(c) If warranted by extenuating and/or mitigating factors in the matter, the disciplinary order maybe stayed by an express condition that the respondent comply with probationary terms and conditions.  
[Emphasis added.]

The terms “extenuating” and “mitigating” as factors in subdivision (c) are the only references for determining whether a probationary order is an appropriate alternative to reproof or license revocation or suspension, yet the terms are undefined anywhere in the Bureau’s title 16 regulations, as applicable to administrative law judges and, arguably, to fiduciary licensees subject to section 4624. The two terms are defined to some extent by other Bureau regulations, including existing sections and section 4604 in the proposed action, that refer to extenuating or mitigating factors or circumstances to be considered by the Bureau. However, nothing in the text of section 4624 or the rulemaking documents clarify whether administrative law judges are bound to these terms as used in other title 16 regulations applicable to the Bureau. Perhaps these terms are defined in statute or regulations elsewhere, but OAL was unable to find it during its review. These terms might also be commonly used by administrative law judges such that no further definition is warranted. However, nothing in the rulemaking documents provides any facts or information to clarify this issue. Moreover, the terms “extenuating” and “mitigating” as factors appear to be the only references to which an administrative law judge might determine which, if any, of the discretionary probationary terms and conditions provided in section 4624(e) should apply. Accordingly, the Bureau needs to determine whether usage of the terms “extenuating” and “mitigating” need to be explained in its supplemental statement of reasons or whether the text needs to be revised to satisfy the clarity standard.



b. Subdivision (e)(4). Subdivision (e) of section 4624 provides discretionary terms and conditions that an administrative law judge may include in a probationary order. Subdivision (e)(4) of section 4624 provides one such discretionary probationary order provision:

(4) In addition to the disciplinary order described in this section, all decisions shall address recovery of the Bureau's investigation and enforcement costs, as described in and authorized by Section 125.3 of the Business and Professions Code. The filing of bankruptcy by respondent shall not relief [sic] respondent of the responsibility to repay the investigation and enforcement costs.  
[Emphasis added.]

In the context of subdivision (e) discretionary probationary provisions, section 4624(e)(4) mandates that “all decisions shall address recovery of the Bureau's investigation and enforcement costs.” Assuming that the Bureau has the authority to mandate such costs by regulation, this mandatory provision appears out of context in the subdivision (e) discretionary probationary order provisions. Additionally, the fact that subdivision (e)(4) refers to “all decisions” and “this section” makes it appear that this regulatory provision is intended to apply to all of the section 4624 disciplinary orders, not just probationary orders, and is misplaced under subdivision (e). Placing it elsewhere in section 4624 so that it applies to all disciplinary orders would be consistent with the statutory provisions for assessing and recovering investigation and enforcement costs “as described in and authorized by Section 125.3 of the Business and Professions Code.”

Notwithstanding, Business and Professions Code section 125.3 does not appear to provide authority for the Bureau to mandate by regulation the recovery of investigation and enforcement costs. Business and Professions Code section 125.3(a) allows an administrative law judge the discretion to “direct a licentiate . . . to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case” in a disciplinary order, if requested by the Bureau, but such an order appears to be solely in the discretion of the administrative law judge. The only mandate that Business and Professions Code section 125.3 appears to impose on an administrative law judge is provided in subdivision (d), which requires an administrative law judge to “make a proposed finding of the amount of reasonable costs of investigation and prosecution of the case when requested [by the Bureau] pursuant to subdivision (a).” Accordingly, it is unclear if the Bureau can mandate by regulation that an administrative law judge require the recovery of investigation and enforcement costs in any disciplinary order in resolution of a disciplinary proceeding under Business and Professions Code section 125.3. OAL was unable to find any other statutory authority to clarify this issue, and the fact that none of the rulemaking documents provide any explanation for section 4624 leaves this section 4624(e)(4) clarity unresolved.

Additionally, section 4624(e)(4) provides, either as a mandatory provision of a probationary order or as a rule in connection to recovering investigation and enforcement costs for all of the section 4624 disciplinary orders, “[t]he filing of bankruptcy by respondent shall not relief [sic] respondent of the responsibility to repay the investigation and enforcement costs.” Similar to the discussion above pertaining to the mandatory recovery investigation and enforcement costs under subdivision (e)(4), it is unclear the extent to which this bankruptcy-related provision

applies or whether it is inconsistent with bankruptcy law. The fact that none of the rulemaking documents provides any explanation or any authority for section 4624 leaves this section 4624(e)(4) clarity unresolved.

The foregoing discussion of section 4624 pertains to several issues that the Bureau needs to resolve to meet the clarity standard in the section 4624 regulation text; however, it is not exhaustive. Since section 4624 also fails the necessity standard, the Bureau needs to explain in its supplemental statement of reasons the factual rationale for the entirety of section 4624, as detailed in the necessity discussion above. The specific provisions discussed above are examples of clarity issues in the regulation text of section 4624 that are related to the necessity standard and should not be construed as the only regulatory provisions of section 4624 that the Bureau's supplemental statement of reasons needs to explain.

### **C. Inadequacy of the Summary and Response to Comments in the Final Statement of Reasons**

Government Code section 11346.9(a)(3) requires that the agency's Final Statement of Reasons contain "a summary of each objection or recommendation made regarding the specific... amendment...proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change." In the proposed action, the Bureau failed to accurately summarize one comment and failed to provide a response to the substance of another comment. Both comments were made in response to the October 2008 proposed 45-day text.

#### **1. Inaccurate Summary of Comment.**

The Bureau modified title 16, section 4606(a) in the June 2009 15-day modified text in response to an oral comment made at the November 18, 2008 public hearing.

As background, section 4606(a) provides the procedure for contesting a Bureau citation by means of a written request within ten days of the citation and is discussed above with regards to its failure to meet the clarity standard. In both the original 45-day text and the modified text, section 4606(a) is unclear as to when the ten-day period commences. The clarity issue aside, this discussion pertains to the Bureau's summary and response to the following oral comment that resulted in the modification to section 4606(a):

On page 5, [section 4606(a)] allowing 10 days on the citation once it is served or received [to request an informal conference to contest a citation]. It's unclear if being received or served is through regular mail or via certified mail. With the issues concerning the Post Office and the delivery of mail, it raises a concern.

This comment is best understood in context of section 4606(a), as originally proposed:

(a) In addition to requesting an administrative hearing as provided for in subdivision (b)(4) of Section 125.9 of the Business and Professions Code, the cited person may request an informal conference to review the acts charged in the

citation. A request for an informal conference shall be made in writing, within ten (10) days after the citation has been served or received.  
[Emphasis added.]

The Bureau accepted what it perceived as the issue in the oral comment, which appears to be whether the usage of “served or received” at the end of section 4606(a) in the proposed 45-day text was intended to include personal service or mailing of the citation. If mailing was intended to be included, then the commenter questioned whether the Bureau intended regular or certified mail. The Bureau summarized and responded to this comment with the following statements on page six of the Final Statement of Reasons:

COMMENT: Section 4606 requires a request for an informal conference be made within ten (10) days after the citation has been served or received. [The commenter] states it is unclear if received or served applies to regular mail or certified mail. With the issues concerning the Post Office and the delivery of mail, it raises a concern.

ACCEPT: Will change the language to make it consistent with Section 4600 to clarify that service has occurred when the citation has been served upon the individual personally or by certified mail.

The resulting modification changed the last sentence in section 4606(a) from the “[a] request for an informal conference shall be made in writing, within ten (10) days after the citation has been served or received” to “[a] request for an informal conference shall be made in writing, within ten (10) days after the citation has been served upon the individual personally or by certified mail.” Essentially, the modification added personal service and certified mail and deleted the word received.

The comment is somewhat unclear on its face, but when read in context of the clarity issue it is apparent that what the commenter intended to raise was related to the commencement of the ten day period when “served or received.” The original 45-day text made no mention of personal service, nor did the commenter. The commenter’s concern assumed service was by mail and specifically raised concerns related to the timing of mail delivery by the “Post Office.”

OAL discussed the clarity issue with the Bureau staff in context of this comment and the resulting June 2009 modification to section 4606(a).

## 2. Response Not Addressing the Substance of the Comment.

The following recommendation was made in a written comment:

As to Section 4544(3)(d) [commenter meant 4544(d) of the proposed text], it should be mandatory that licensee's get [fined] for failure to comply with Section 4544 of Article 7 of Title 16 Division 41, Section 4544 et seq., not just maybe as stated in the newly proposed Section [4544(d)].

The Bureau rejected this recommendation by responding to the comment with the following statement on page three of the Final Statement of Reasons:

REJECT: Any regulation related to the Bureau's cite and fine or disciplinary process provisions must comply with the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code).

While the Bureau has discretion to reject the recommendation, the response fails to provide an adequate reason. How the statement regarding compliance with the APA is related to the Bureau's reasoning is unclear. In order to address this procedural deficiency, the Bureau must amend or supplement its Final Statement of Reasons with a response that addresses the substance of this comment.

### **CONCLUSION**

For the foregoing reasons, OAL disapproves the Bureau's proposed rulemaking action. If you have any questions, please do not hesitate to contact me at (916) 323-6809.

Date: November 16, 2009



Richard L. Smith  
Staff Counsel

FOR: SUSAN LAPSLEY  
Director

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